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No. 06-534

In The
Supreme Court of the United States

INITIATIVE AND REFERENDUM INSTITUTE, ET AL.,

Petitioners,

v.

GARY HERBERT, LIEUTENANT GOVERNOR OF UTAH; MARK SHURTLEFF, ATTORNEY GENERAL OF UTAH,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF AMICI CURIAE WESTERN WILDLIFE CONSERVANCY; FRIENDS OF GREAT SALT LAKE; SAVE OUR CANYONS; GREAT SALT LAKE AUDUBON; GREAT SALT LAKEKEEPER; THE BRIDGERLAND AUDUBON SOCIETY; THE COUGAR FUND; SINAPU; JOHN M. NEUHOLD, Ph.D.; AND JOHN G. CARTER, Ph.D. IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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MOTION OF WESTERN WILDLIFE CONSERVANCY, FRIENDS OF GREAT SALT LAKE, SAVE OUR CANYONS, THE BRIDGERLAND AUDUBON SOCIETY, GREAT SALT LAKE AUDUBON, GREAT SALT LAKEKEEPER, SINAPU, THE COUGAR FUND, JOHN M. NEUHOLD, Ph.D., AND JOHN G. CARTER, Ph.D. FOR LEAVE TO FILE A BRIEF AMICI CURIAE IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

Western Wildlife Conservancy, Friends of Great Salt Lake, Save Our Canyons, The Bridgerland Audubon Society, the Great Salt Lake Audubon, Great Salt Lakekeeper, Sinapu, The Cougar Fund, John M. Neuhold, Ph.D. and John G. Carter, Ph.D. ("the Movants") respectfully move this Court to grant them leave to file the attached brief as amici curiae in the above captioned case. The Petitioners have consented to the participation of the Movants as amici. A letter attesting to their consent has been submitted to this Court. The Respondents have withheld consent to the Movants' participation as amici.

The Movants are primarily member-based non-profit organizations that advocate a "nonconsumptive viewpoint" with respect to wildlife management. Each of the Movants, and their missions, is described below:

The Western Wildlife Conservancy is a member-based non-profit organization located in Salt Lake City, Utah. The mission of Western Wildlife Conservancy is to protect and enhance native wildlife populations and their habitats in the Intermountain West through research, education and advocacy. Western Wildlife Conservancy is located at 68 S. Main St., Suite 4, Salt Lake City, UT 84101 and maintains its Web site at www.westwildcon.org.

Friends of Great Salt Lake, is a member-based non-profit organization with its headquarters in Salt Lake City, Utah. The mission of Friends of Great Salt Lake is to preserve and protect the unique Great Salt Lake ecosystem and to increase public awareness and appreciation of the lake through education, research and advocacy. Friends of Great Salt Lake can be reached at PO Box 2655, Salt Lake City, UT 84110, and maintains its Web Site at www.xmission.com/~fogsl/.

Save Our Canyons a member-based non-profit organization located in Salt Lake City, Utah. Save Our Canyons represents citizens' interests in issues involving the public and private domains of Utah's Wasatch Mountain Range. Save Our Canyons seeks to preserve all of the untouched natural areas of the central Wasatch for the sake of wildlife, watershed, and for the health and well-being of the residents in the valley below the Wasatch Range. Save Our Canyons is located at 68 S. Main St., Suite 4, Salt Lake City, UT 84101, and maintains its Web Site at www.saveourcanyons.org.

The Bridgerland Audubon Society is the Logan, Utah chapter of the National Audubon Society. The mission of this member-based non-profit organization is to conserve, enhance, and enjoy the natural environment, with special emphasis on birds and their habitats, for the benefit and education of humanity and for the biological diversity of the Earth. Bridgerland Audubon Society can be reached at PO Box 3501, Logan, UT 84323, and it maintains its Web Site at www.bridgerlandaudubon.org.

Great Salt Lake Audubon, a member-based non-profit organization located in Salt Lake City, Utah, is dedicated to protecting and enhancing habitat for wild birds, animals,

and plants, and to maintaining healthy and diverse environments for wildlife and people throughout the state. Great Salt Lake Audubon can be contacted at PO Box 520867, Salt Lake City, UT 84152, and it maintains its Web Site at www.greatsaltlakeaudubon.org.

Great Salt Lakekeeper is a member-based non-profit organization located in Salt Lake City, Utah. This organization's mission is to protect, preserve and defend the watershed resources of the Great Salt Lake drainage basin. Great Salt Lakekeeper is located at 623 E. 100 South, Salt Lake City, UT 84102, and it maintains its Web Site at http://greatsaltlakekeeper.org/.

Sinapu, a member-based non-profit organization located in Boulder, Colorado, is named after the Ute Indian word for wolves. Sinapu is dedicated to the restoration and protection of native carnivores and their wild habitat in the Southern Rockies and connected high plains and deserts. Sinapu can be reached at PO Box 3243, Boulder, CO 80307, and it maintains its Web Site at www.sinapu.org.

The Cougar Fund, a member-based non-profit organization located in Jackson, Wyoming, aims to ensure the protection of the cougar throughout the Americas. The Cougar Fund educates the public on the value of cougars in nature and promotes the gathering and application of sound science in their management. The Cougar Fund can be reached at PO Box 122, Jackson, Wyoming 83001, and it maintains its Web Site at www.cougarfund.org.

John M. Neuhold, Ph.D., 1254 Island Dr., Logan, UT 84321, is Professor Emeritus in Aquatics Ecology at Utah State University. Dr. Neuhold is an internationally

known expert in his field and has authored numerous professional research papers concerning wildlife.

John G. Carter, Ph.D., 250 S. Main St., Mendon, UT 84325 has an educational and professional background in engineering, business, and ecology. He is the founder of Willow Creek Ecology and has done contract work for Browning Arms, Envirocare, and Nucor Steel.

This case at bar has a direct bearing on the Movants and their missions. At issue is an amendment to the Utah Constitution that reduces the value of a vote favoring an initiative petition concerning wildlife to half of a vote favoring the status quo (the "Utah Amendment"). This measure is aimed directly at deterring the Movants and similarly situated individuals and groups that advocate a nonconsumptive viewpoint from bringing a wildlife initiative. The Movants are already disenfranchised from a wildlife management system in Utah that is institutionally biased toward interests that value animals solely as objects for hunting and trapping, rather than valuing animals for their intrinsic, esthetic, and ecological value. To compound this disenfranchisement, the Utah Amendment enshrines the existing viewpoint of Utah's wildlife management system into perpetuity and effectively ensures that future majorities of voters can have no direct voice in participating in Utah wildlife policy through the initiative process. This extraordinary supermajority requirement thus deprives many Utah citizens of the right to have their vote on an initiative concerning wildlife issues count as much as the vote of citizens who support the status quo. The Utah Amendment effectively chills the speech of those who would otherwise bring an initiative and engage in the election-related speech and expression that process requires because the chances for success are negligible.

Because the Utah Amendment removed the last arrow in the quiver of advocates of the nonconsumptive viewpoint to affect Utah wildlife law through the electoral process, the Movants respectfully request the opportunity to advise the Court more fully on the urgency of granting the petition for writ of certiorari.

Respectfully submitted,

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QUESTION PRESENTED

Whether the First Amendment prohibits a state from imposing both content and viewpoint-based restrictions upon an initiative process with the purpose of diminishing the voice of voters who favor one viewpoint relative to those with an opposing viewpoint. The courts of appeal are in conflict on this question.

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IDENTITIES AND INTEREST OF AMICI CURIAE[1]

The Amici Curiae ("Amici") include the following: Western Wildlife Conservancy; Friends of Great Salt Lake; Save Our Canyons; Great Salt Lake Audubon; Great Salt Lakekeeper; The Bridgerland Audubon Society; The Cougar Fund; Sinapu; John M. Neuhold, Ph.D.; and John G. Carter, Ph.D.

The Amici are primarily member-based non-profit organizations ("Amici Organizations") that advocate a "nonconsumptive viewpoi t" with respect to wildlife management. Two of the Amici are ecologists with doctoral degrees in their fields. All of the Amici are proponents of the nonconsumptive viewpoint, which advocates values beyond the traditional "consumptive" values of hunting and trapping. Consequently, the Amici often favor greater restrictions on the taking, or method of taking, certain wildlife species. To promote their viewpoint, the Amici Organizations hold regular meetings, organize events around nonconsumptive wildlife activities, attend government agency meetings concerning wildlife management, engage in letter-writing campaigns on wildlife management issues, submit written comments to decision-making boards on wildlife management issues, and otherwise take an active role in advocating nonconsumptive values. The Amici Organizations also promote and/or engage in a number of other activities that reflect a nonconsumptive viewpoint, including viewing, tracking, researching, and photographing wildlife species in their habitats. In addition, the Amici also believe that nonconsumptive wildlife activities are a powerful source of economic revenue

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[1] Petitioners have consented to the Amici filing this brief and a letter confirming such consent has been submitted to the Court. Respondents have not consented to the Amici's participation. No counsel for a party authored this brief in whole or in part. No party other than the Amici, its members, or its counsel has made a monetary contribution to the preparation or submission of this brief.

generation in Utah, and they promote those activities to others.

The Amici recognize an important distinction between "nonconsumptive" and "consumptive" *uses* of wildlife and how these uses correspond to a *viewpoint* toward wildlife. Given that the same individual may shoot a bear with a camera one day and a gun the next, the "distinction of real importance for understanding [the difference between the consumptive and nonconsumptive viewpoints] is the one that differentiates between people who see nothing wrong with hunting animals for sport and people who do, not the one between hunting wildlife and watching wildlife." Kirk Robinson, *Social Issues of Black Bear Hunting: The Non-Consumptive Perspective*, Utah Black Bear Management Plan 44, Utah Division of Wildlife Resources, 2000.[2] On this basis, the Amici advocate the nonconsumptive viewpoint; that is, they view wild animals as possessing intrinsic, esthetic, and ecological value that transcends the value they have as mere objects to be apportioned for hunting and trapping. Because the Utah law at issue implicates the First Amendment by discriminating against the Amici's nonconsumptive viewpoint, the Amici respectfully urge the Court to grant Petitioners' request for a writ of certiorari.

SUMMARY OF THE ARGUMENT

The Amici encourage the Court to grant the Petitioners' writ and resolve the deepening split among the circuit courts concerning the extent to which a legislature can impose content and viewpoint-based restrictions on the initiative process without implicating the First Amendment. The Amici agree with the Petitioners that Article VI, section (2)(a)(ii) of the Utah Constitution (the "Utah Amendment"), which requires that any citizen-supported initiative enacting legislation concerning "the taking of

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[2] Viewable at http://www.wildlife.utah.gov/bear/pdf/00bearplan.pdf. Mr. Robinson is affiliated with Amici Western Wildlife Conservancy.

wildlife" must receive "the approval of two-thirds of those voting," directly implicates the First Amendment. Indeed, the Utah Amendment deliberately discriminates against citizens who advocate a nonconsumptive viewpoint toward wildlife management, effectively "chills" speech by discouraging nonconsumptive advocates from using the initiative process, and dilutes the voice and vote of anyone daring enough to use the initiative process to speak against Utah's existing wildlife policies at the ballot box by giving their vote half the value of a vote favoring the status quo. Even though the purpose of the initiative process is to allow citizens to enact legislation that runs counter to the interests of sitting policymakers, the Utah Amendment rigs that process to favor entrenched consumptive wildlife interests in Utah.

The Court's First Amendment jurisprudence broadly recognizes that the process of proposing legislation through the initiative process involves core political speech. *Meyer v. Grant*, 486 U.S. 414, 421 (1988). In the decision below, however, the Tenth Circuit incorrectly concluded that the Utah Amendment does not implicate the First Amendment at all. The Tenth Circuit held that the Utah Amendment "determines the conditions under which citizen-initiated legislation becomes law" but "does not regulate speech or expressive conduct." *See* Appendix to Petition for Writ of Certiorari ("Pet. App." at 44). The ruling that the Utah Amendment raises no free speech concerns further deepens a split among the circuit courts regarding the extent to which regulations of the initiative process implicate the First Amendment. *See Wirzburger v. Galvin*, 412 F.3d 271, 279 (1st Cir. 2005) (holding that "regulations of the state initiative process" do affect free expression); *Marijuana Policy Project v. United States*, 304 F.3d 82 (D.C. Cir. 2002) (holding that the wholesale removal of a subject from the initiative process does not offend the First Amendment).

The historical record demonstrates the Utah Amendment's intent to discriminate against the nonconsumptive viewpoint. Here, the legislative record plainly demonstrates that the Utah Amendment's backers sought to

manipulate the initiative process specifically to ensure that advocates of the nonconsumptive viewpoint never use the initiative process to make their case for a change in Utah wildlife policy. *See* Petition for Writ of Certiorari ("Pet." at 2-5). Given that the circuits disagree as to whether this type of discrimination violates the First Amendment, as well as the threat Utah-style rigging poses to the electoral process nationwide, this Court should grant the petition for writ of certiorari.

STATEMENT OF THE FACTS

Amici Curiae adopt the statement of facts set forth in the Statement of the Case in the Petition.

ARGUMENT

I. The Utah Amendment Discriminates Against The Nonconsumptive Viewpoint.

The First Amendment forbids government from enacting legislation that discriminates against the expression of a particular viewpoint simply because some lawmakers disagree with that viewpoint. "The First Amendment forbids the government to regulate speech in ways that favor some viewpoints or ideas at the expense of others." *Members of City Council of City of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 804 (1984). In such cases, "[t]he principal inquiry in determining content neutrality, in speech cases generally . . . is whether the government has adopted a regulation of speech because of disagreement with the message it conveys." *Ward v. Rock Against Racism*, 491 U.S. 781, 791-792 (1989). To determine whether a law discriminates against a particular viewpoint, courts look to a number of factors, including a biased legislative history and the events surrounding the law's enactment. *See, e.g., Ridley v. Mass. Bay Transp. Auth.*, 390 F.3d 65, 86-87 (1st Cir. 2004) ("There are various situations which will lead a court to conclude that, despite the seemingly neutral justifications offered by the government, nonetheless the decision to exclude speech is

a form of impermissible discrimination. . . . First, statements by government officials on the reasons for an action can indicate an improper motive.") (*citing Vill. of Arlington Heights v. Metro. Housing Dev. Corp.*, 429 U.S. 252, 268 (1977)); *see also Church of the Lukumi Babalu Aye,* 508 U.S. at 540 (analysis under First Amendment free exercise clause) (noting that "Relevant evidence includes, among other things, the historical background of the decision under challenge, the specific series of events leading to the enactment or official policy in question, and the legislative or administrative history, including contemporaneous statements made by members of the decision making body.").

The Utah Amendment is rooted in a fundamental disagreement with the views of nonconsumptive advocates who might pursue an "anti-hunting, anti-fishing type initiative." Pet. at 3. Not only was the Utah Amendment's purpose to chill speech, but it also sought to regulate expression by channeling the speech of those critical of Utah's current wildlife management practices away from the citizen-driven initiative process and into the very bureaucratic miasma that initiatives are designed to supersede. In doing so, the Utah Amendment effectively eliminated the last remaining opportunity for advocates of the nonconsumptive viewpoint to persuade a majority of voters to enact an initiative that reflects that viewpoint.

A. The Utah Amendment Is The Work Of Powerful Consumptive Wildlife Interests That Control Utah Wildlife Law.

In 1998, both houses of the Utah Legislature passed a resolution proposing to amend the Utah Constitution to require that any initiative enacting legislation concerning "the taking of wildlife" must receive "the approval of two-thirds of those voting." Pet. at 2. Cast against a fear that out-of-state wildlife advocacy groups were coming to Utah "pushing initiatives, and threatening to overturn our management of wildlife" in Utah, the proposed amendment's stated purpose was "basically [to] make it much

more difficult in the State of Utah to do any anti-hunting, anti-fishing type initiative." Pet. at 3. The measure's proponents feared that "animal rights activists [would] persuade Utahns to pass a ballot initiative to limit cougar hunting or bear-baiting," measures passed by initiative in other states. Judy Fahys, *Wildlife Board Adds Backing for Prop. 5*, THE SALT LAKE TRIBUNE, September 24, 1998 at B1. Thus, the amendment's sponsors actively sought to "*discourage* . . . [the] activity in the State of Utah [of] putting anti-hunting and anti-fishing regulations on the ballot." Pet. at 2-3; 3 Floor Debate, 52nd Legl., Gen. Sess. (Utah Feb. 3, 1998) (Senate Recording Tape no. 17) (statement of Sen. Blackham).[3] Following passage by both houses of the Utah Legislature, the proposed amendment was dubbed "Proposition 5." Pet. at 3.

Leading the charge behind Proposition 5, and pro-hunting consumptive interests in Utah generally, was the Sportsmen for Fish and Wildlife ("SFW"), a powerful lobbying group in Utah. The SFW "commands a growing army of 10,000 that is quiet and camouflaged, restless and armed with political firepower." Skip Knowles, *The Don of Wildlife*, THE SALT LAKE TRIBUNE, February 17, 2003 at A1. This group has been credited with single-handedly "rewr[iting] the state constitution to limit the use of citizen initiatives in wildlife management through Proposition 5." *Id.* The SFW's focus "is to grow more critters and have a fair way to divvy them up." *Id.* The group's founder, Mr. Don Peay, is one of Utah's "most influential powerbrokers," who, "for better or worse . . . dictates wildlife policy in Utah." *Id.* He has been credited with "bring[ing] back spring bear hunts and boost[ing] cougar harvests" that the Amici oppose. *Id.* During hearings before the Utah Constitutional Revision Commission, an advisory body charged with vetting proposed amendments to the Utah Constitution, Pet. at 3-4, Mr. Peay described Proposition 5 as "an effort to preserve Utah's wildlife practices from East Coast Special Interest groups."

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[3] The Petitioners have made these materials available to the Court, pursuant to a letter dated October 11, 2006.

Id. at 4. Mr. Peay claimed that Utah's wildlife system was being attacked by "the Washington DC [sic] agenda." Pet. App. at 6.

During the campaign that followed, Proposition 5's sponsors warned voters about "local animal extremists" and "extremist groups pushing a Washington D.C. liberal agenda using ballot initiatives." Pet. at 4. Proposition 5 was described to voters as a measure to preserve Utah's wildlife management system in which "citizens ideas blend[ed] with science by trained biologists to effectively balance the needs of all wildlife with available habitat and human population growth." Sen. Leonard Blackham, Utah Voter Information Pamphlet 35 (1998). These official justifications, however, belie the special interest politics that gave rise to the measure and run contrary to Mr. Peay's stated views. According to Mr. Peay, "Nowadays its not science, it's politics that make wildlife decisions, and if that is how the game is going to be played, we'll play it to win." Knowles, *supra* at A1.

Even though the Utah Constitutional Revision Commission recommended against Proposition 5, the measure survived the 1999 campaign and became Article VI, Section 1 (2)(a)(ii) of the Utah Constitution. *Id.* at 5.

B. Utah's Wildlife Management System Structurally Discriminates Against The Nonconsumptive Viewpoint.

The Utah Amendment's bias against the nonconsumptive viewpoint reflects a larger institutional bias against that perspective that is enshrined in Utah's wildlife management bureaucracy.

Three kinds of entities play a role in making Utah wildlife law under the broad auspices of the Utah Division of Wildlife Resources (DWR), the administrative agency charged by statute with managing Utah wildlife.[4] *See*

[4] The current Director of Utah's Department of Natural Resources, the state executive agency that encompasses the Division of Wildlife Resources, is Michael Styler. Mr. Styler also served in the Utah

(Continued on following page)

Utah Code Ann. § 23-14-1. These entities include: 1) the Utah Wildlife Board, which consists of seven members and actually implements wildlife policies, *see id.* at § 23-14-2, § 23-14-3; 2) the five Regional Wildlife Advisory Councils ("RACs"), which consist of between 12 and 15 members each and make policy recommendations to the Wildlife Board, *see* Utah Code Ann. § 23-14-2.6; and 3) the Wildlife Board Nominating Committee ("Nominating Committee"), which consists of eleven members and recommends candidates for open Wildlife Board positions. *See* § 23-14.-2.5.

Utah law requires that each of these governmental entities satisfy a membership distribution requirement, but these requirements are highly malleable. For example, of the eleven members the Wildlife Board Nominating Committee, two members are designated to represent "nonconsumptive" wildlife interests. Utah Code Ann. § 23-14-2.6(2)(c); § 23-14.-2.5(2)(c). At the time the Utah Amendment was passed, however, the head of the Nominating Committee was the SFW's powerful Don Peay. *See* Knowles, *supra,* at A1. This apparent conflict of interest did not go unnoticed. As one wildlife advocate was quoted as saying, "It is especially troubling to see the institutionalized conflict of interest that exists between Don Peay and the Wildlife Board members . . . I am concerned that Peay is both the chair of the Wildlife Board nominating committee and the major lobbyist for numerous policy issues that come before the Wildlife Board." Tom Wharton, *Conservationists Angry About Deer Hunt on Antelope Island,* THE SALT LAKE TRIBUNE, September 12, 2000 at C1. Since Mr. Peay held that post, the Wildlife Board has been criticized as having a "slant [toward] hunters despite the policy-making group's mission to represent hunters as well as fishers and nonconsumptive wildlife advocates." Brett Prettyman, *Angling Advocate's Candidacy for Wildlife Board Fails,* THE SALT LAKE TRIBUNE, November 3, 2003 at B2.

Legislature, where he sponsored Proposition 5 and spoke in favor of the measure on the floor of Utah's House of Representatives, as well as before the Utah Constitutional Revision Commission. *See* Pet. at 3.

In fact, the Wildlife Board, which is actually responsible for "establish[ing] the policies best designed to accomplish the purposes and fulfill the intent of all laws pertaining to wildlife," does not require representation for nonconsumptive interests at all. *Id.* at § 23-14.-3(2). The fact that four members of the Wildlife Board held a news conference to announce the board's "official and unanimous support for Proposition 5" evidences the lack of such representation. Fahys, *supra* at B1.[5]

Moreover, the RACs – the regional entities that hear comment on wildlife issues and make recommendations to the Wildlife Board – are also unresponsive to the nonconsumptive viewpoint. While the RACs include twelve to fifteen members, including two members nominally representing "nonconsumptive wildlife" interests, the other interests to be represented are so broad (i.e., agriculture, the public at large, federal land agencies) that powerful consumptive wildlife interests are able to "stack the deck" to suit their interests. More troubling, the "nonconsumptive" position on the RACs are themselves officially promoted as being open to "people who hunt, fish, trap or participate in other consumptive-oriented recreational activity." *See* Utah Division of Wildlife Resources, *Two Needed for Wildlife Advisory Councils in Southern Utah* (Press Release), August 17, 2006, at http://www.wildlife.utah.gov/news/02-08/rac.php. Thus, nonconsumptive wildlife advocates generally regard the RACs as favorable only to pro-hunting interests. *See e.g.,* High Uintas Preservation Council, *Utah Wolf Plan Hearings Being Held By Regional (Wildlife) Advisory Councils*, at http://hupc.org/Archive/2005%20/wolfhear.htm (describing the RACs as "a hostile and biased group focused only on

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[5] On September 25, 1998, following heavy criticism that the Wildlife Board's endorsement of Proposition 5 the previous day violated Utah's open meetings law, the four members who announced that endorsement stated the endorsement did not represent "the panel's official view," but only their views as individuals. Tom Wharton, *Wildlife Board Clarifies Proposition 5 Position*, THE SALT LAKE TRIBUNE, September 25, 1998, at B3.

recreational sport hunting and always adverse to any ecological or nonconsumptive values of wildlife").

The RAC system's bias against the nonconsumptive viewpoint has prompted some nonconsumptive representatives to resign their RAC seats. For example, Dick Carter, a longtime Utah wildlife activist, gave up his nonconsumptive member RAC seat in protest against the system's "dysfunction." *See* Wharton, *supra* p. 8, at C1. In his resignation letter,[6] Mr. Carter stated:

> [O]ur [nonconsumptive] interest can't be met under these biased conditions.... Under this context there is no value in our participation. Thus I resign, without equivocation, from the Northern Region Wildlife Advisory Committee.... With the way this process is constructed (1- environmentalists/ nonconsumptive users held at an intended extreme minority, 2-voting and 3-voting on proclamations), it is a hopeless endeavor on [sic] either the short or long term to generate a substantive discussion on policy issues.... [I]t is as though we don't even exist as either an opportunity or value. The concern is for hunter opportunity to the exclusion of any other values or public issues.

Finally, while the RACs are designed to take public input on wildlife management issues, *see* Utah Code Ann. § 23-14-2.6, the Wildlife Board is under no obligation to give any particular weight to public comment. Thus, even if a vast majority of citizens favored a particular outcome on a wildlife management practice, there is nothing citizens can do to make any law by participating in the RAC system.

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[6] A copy of this letter is included in the appendix to this brief.

C. The Utah Amendment Was Designed To Channel Speech Away From The Citizen-Driven Initiative Process And Into The Wildlife Management Bureaucracy That Is Biased Against The Nonconsumptive Viewpoint.

It is the inherent structural bias against the nonconsumptive viewpoint in Utah's policymaking realms that makes the availability of an initiative option vital. After all, the very purpose of the initiative process is "to enact reforms that run contrary to the interests of sitting legislators," Kris W. Kobach, *Taking Shelter Behind the First Amendment: The Defense of the Popular Initiative*, in THE BATTLE OVER CITIZEN LAWMAKING 168 (M. Dane Waters, ed. 2001). The Utah Amendment, however, eliminated this safety valve for nonconsumptive advocates to have an equal opportunity to impact the formation of wildlife policy. Indeed, rather than tolerate discourse through the initiative process that might alter the status quo, the Utah Amendment's backers proclaimed that public input on wildlife management should be channeled through the RACs – even though the RACs are unfamiliar to many citizens, are weighted heavily toward consumptive interests, lack any policymaking power, and are not required to give any particular weight to public input.

The degree to which the Utah Amendment's backers spoke openly about trying to steer speech away from the initiative process and into the RAC system is surprising. The materials provided to voters in support of the Utah Amendment stated that the Director of the Utah Division of Wildlife Resources hoped that "all citizens will establish a dialogue about wildlife management *using the current wildlife management process of regional wildlife advisory councils, not the ballot box.*" Utah Voter Information Pamphlet 35 (1998) (emphasis added). Demonstrating that it was a fear of ideas that prompted this concern, these materials further claimed that "local animal extremists" were "threatening to take management of Utah's wildlife into their own hands" by "*taking [their] cause directly to*

the citizens of Utah by means of an initiative." Id. (emphasis added); Pet. App. at 5. The Utah Amendment's backers actively sought to discourage people from "taking [their] cause directly to the citizens of Utah" precisely because it would undercut the current system where citizens have no ultimate power but where *"the wildlife board meets and they make the decisions."* Floor Debate, 52nd Leg., Gen. Sess. (Utah Feb. 25, 1998) (house recording tape no. 2) (statement of Rep. Styler) (emphasis added).[7]

II. The Utah Amendment Implicates The First Amendment.

Plainly, the legislative history behind the Utah Amendment, the pro-hunting political context from which it emerged, the institutional biases against the expression of the nonconsumptive viewpoint in administrative realms, and the statements of ~~those~~ nonconsumptive advocates disenfranchised from Utah's wildlife system, all demonstrate a strong bias directed against the expression of the nonconsumptive viewpoint. As demonstrated below, the Tenth Circuit was incorrect in concluding that such a measure does not impact the First Amendment at all.

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[7] The claim that speech on wildlife issues should be channeled through the RAC system, rather than through the initiative process, was also presented to the Tenth Circuit by a group of pro-hunting-oriented Amici below. They argued that "Utah's extensive system of public comment and citizen panels provides a meaningful alternative to the initiative process." *See* Supplemental Brief of Amici Curiae Utah Wildlife Federation et al., Supporting Defendants/Appellees/Cross-Appellants at 22. This argument lacks legal merit, but underscores that the Utah Amendment's supporters include pro-consumptive advocates that are interested in fostering the pro-consumptive viewpoint reflected in the Utah Amendment and in Utah's current wildlife management system.

A. The Tenth Circuit's Ruling Conflicts With The First Circuit's Ruling That The Restrictions On The Initiative Process Implicate The First Amendment.

Taking the position that the First Amendment has no relevance to the rigging of the initiative process, the Tenth Circuit's decision conflicts directly with the First Circuit's decision in *Wirzburger v. Galvin*, 412 F.3d 271 (1st Cir. 2005). In *Wirzburger,* the court ruled that a provision in the Massachusetts constitution forbidding initiatives concerning public support for private or religiously-affiliated schools did implicate the First Amendment. The First Circuit held that removal of an issue from the initiative process prevented the plaintiffs "from engaging in the sort of activity that implicates the First Amendment." *Id.* at 276. The First Circuit looked primarily to this Court's ruling in *Meyer,* noting that "the Supreme Court has made clear that the process involved in proposing legislation by means of initiative involves core political speech." *Id.* (quoting *Meyer*, 486 U.S. at 421). The First Circuit disagreed with the D.C. Circuit's holding in *Marijuana Policy Project*, where the court held that the exclusion from the initiative process of laws reducing penalties for marijuana possession "restricted no speech." 304 F.3d at 85. Though neither court found that removal of subject matter from the initiative process constituted a direct regulation of speech, the First Circuit held that "a state initiative process manifests elements of protected expression" that require the application of intermediate scrutiny under *O'Brien,* 412 F.3d at 278.

The *en banc* majority below held that the *Wirzburger* approach fails because restrictions on the initiative process do not actually restrict expression. Pet. App. at 40. At a minimum, however, the Amici agree with the Petitioners and with the dissenting opinion below that the Utah Amendment's rigging of the initiative process implicates both speech and non-speech conduct. As the dissent below noted, "initiative elections are so suffused with speech that any attempt to control the outcome of an election affects

the speech rights of those competing in the election." Pet. App. at 60. An initiative campaign, in fact, "*requires* speech" and laws that "bias electoral results also may unconstitutionally chill election-related speech." *Id.* (emphasis in original).

Here, the Tenth Circuit's holding that the Utah Amendment does not affect free speech has greater First Amendment implications than decisions from the First Circuit and the D.C. Circuit. In *Wirzburger* and *Marijuana Policy Project,* the courts addressed the free speech implications of the wholesale removal of a subject from the initiative process. Missing from the appellate courts' decisions in *Wirzburger* and *Marijuana Policy Project*, however, is any acknowledgement that the regulations of the initiative process were enacted specifically to discourage certain citizens holding a particular viewpoint from using the initiative process to create political change. This distinction illuminates the need for the Court to review the First Amendment impact of initiative regulations with the purpose of chilling speech.

Additionally, the Utah Amendment's purpose of channeling speech away from the initiative process and into the RAC system is anathema to the First Amendment. After all, "[t]he First Amendment mandates that we presume that speakers, not the government, know best both what they want to say and how to say it." *Riley v. National Federation of the Blind of North Carolina, Inc.*, 487 U.S. 781, 791, (1988). It is axiomatic that "[t]he First Amendment protects appellees' right not only to advocate their cause but also to select what they believe to be the most effective means for so doing." *Meyer*, 486 U.S. at 424. In attempting to discourage speech through the initiative process in favor of channeling speech through the biased and burdensome RAC system, the Utah Amendment directly implicates speech. Plainly, there are profound differences in the method, nature and quantity of speech expressed in a state-wide initiative process, as opposed to the public input session of a regional administrative body that lacks policymaking authority. The initiative process is a "uniquely provocative and effective method of spurring

public debate." *Wirzburger,* 412 F.3d at 276. In the initiative process, the incentive is great to speak to voters as often as possible and through as many media as possible because voters hold the decision-making power. This simple fact also assures that citizens are likely to hear views from both an initiative's proponents and opponents alike. The same cannot be said for public input sessions in poorly publicized RAC meetings where the incentives for mass participation are low because citizens are not the decision-makers. Moreover, in RAC meetings, speech is directed at a bureaucracy rather than other citizens and the administrative body has no duty to respond to or act upon public input. The RACs do not provide a meaningful alternative to the initiative process and the existence of a "'more burdensome avenue[] of communication,'" does not relieve the Utah Amendment's "burden on First Amendment expression." *Meyer*, 486 U.S. at 424 (quoting *FEC v. Massachusetts Citizens For Life, Inc.*, 479 U.S. 238 (1986)).

B. The Tenth Circuit's Ruling Improperly Elevates The Utah Amendment's Legislative Form Over Its Substantive First Amendment Impact.

To conclude that the Utah Amendment did not impact free speech, the Tenth Circuit employed a limited construction of the Utah Amendment as a regulation of "the process by which legislation is enacted." Pet. App. at 40. The Tenth Circuit overlooked, however, that laws that are merely a pretext for controlling speech "would clearly implicate First Amendment concerns and require analysis under the appropriate First Amendment standard of review." *Arcara v. Cloud Books, Inc.* 478 U.S. 697 (1986), 708 (O'Connor, J., concurring). Even a neutral veneer cannot "save a regulation that is in reality a facade for viewpoint-based discrimination," *Cornelius v. NAACP Legal Defense & Educ. Fund*, 473 U.S. 788, 811 (1985), one "that is in fact based on the desire to suppress a particular point of view." *Id.* at 812. Here, the Utah Amendment's superficial neutrality simply masks its discriminatory

purpose to suppress the nonconsumptive viewpoint and tie the hands of future majorities with a view different from the status quo.

In describing the Utah Amendment as a limited imposition on the legislative process, the Tenth Circuit distinguished the Utah Amendment from a regulation of "the process of advocacy itself" requiring strict scrutiny under *Meyer*, *id.* at 34, or a "restrict[ion on] on expressive conduct," requiring intermediate scrutiny under *United States v. O'Brien,* 391 U.S. 367 (1968). Pet. App. at 40. To be sure, the court acknowledged that the Utah Amendment may make it more difficult to pass a wildlife initiative, but nevertheless held that the First Amendment "does not ensure that all points of view are equally likely to prevail," *id.* at 38, and "no one has a right under the First Amendment to be taken seriously." *Id.* at 40. As the Petitioners noted, however, even if there is no right for speech to be effective, however, there is a right for one's speech to have the same *opportunity* to be effective. Pet. at 10, n.7. The Utah Amendment subverted this principle by diluting the speech of those who would challenge the existing wildlife management regime in Utah at the ballot box.

Moreover, the initiative process is not a dull legislative exercise as the Tenth Circuit intimates, but a "uniquely provocative and effective method of spurring public debate." *Wirzburger,* 412 F.3d at 276. This process "constitutes expressive conduct" *id.*, "involv[ing] core political speech." *Id.* (*citing Meyer*, 486 U.S. at 421). Thus, the First Amendment protections for this process extend more broadly than merely prohibiting laws that tell speakers directly what to say and how to say it. For example, in *Meyer,* the challenged law did not directly "prevent" speech or restrict a particular viewpoint; rather it regulated the incentives that could be used "as an inducement to the circulation" of an initiative or referendum. *Id.* at 416. The law's stated justifications (ensuring that initiatives had "sufficient grass roots support" and protecting the "integrity of the initiative process") were unrelated to silencing speech, but the Court nevertheless

applied "exacting scrutiny." 486 U.S. at 418-420, 425. Similarly, in *Buckley v. American Constitutional Law Found., Inc.*, 525 U.S. 182 (1999), the Court struck down initiative provisions requiring, *inter alia,* that petition circulators be registered voters and wear name badges. While both cases applied strict scrutiny to strike down the restrictions, nothing in those cases suggested that the restrictions were designed expressly to discourage certain citizens from using the initiative process.

In distinguishing the burdens on *petitioners* in *Meyer* from the burdens on the initiative *process* in the present case, the Tenth Circuit avoided addressing how regulations on the initiative process can be wielded offensively to limit First Amendment expression that is inherent in the initiative process. Unlike *Meyer,* the express purpose of the Utah Amendment was, in fact, to chill speech by making it "much more difficult . . . to do any anti-hunting, anti-fishing type initiative." Pet. at 3. This legislative history suggests that the Utah Amendment is little more than a pretext for suppressing the expression of the nonconsumptive viewpoint through the initiative process. Now, regardless of whether a present or a future majority – even a 66% majority – of the population supports greater restrictions on wildlife takings, such majority will be unable to use the initiative process to enact its preferences into law because such efforts would be futile. Pet. App. at 56-57.

It is also important to address the Tenth Circuit's view that Petitioners' challenge to the Utah Amendment is so broad that "every structural feature of government that makes some political outcomes less likely than others – and thereby discourages some speakers from engaging in protected speech – violates the First Amendment." Pet. App. at 36. This is a straw-man argument. The court wrongly gives the same First Amendment weight to every statute or rule that requires a supermajority vote, without regard to whether the law's purpose is to stifle speech from a particular viewpoint. *Id.* at 36-37. Rather, a substantive First Amendment difference exists between laws that have an "inevitable effect" of reducing speech because they make political success more difficult, *id.,* and laws that are

designed to have the effect of discouraging expression. Indeed, "[a]part from the text, the effect of a law in its real operation is strong evidence of its object." *Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 535 (1993) (applying free exercise doctrine). In this light, the court's reference to Minnesota's requirement of a legislative supermajority for passing "a general banking law," for example, bears little First Amendment resemblance to a law whose purpose is "definitely [to] discourage" anyone from "putting anti-hunting and anti-fishing regulations on the ballot." Pet. at 3.

Finally, the Tenth Circuit overlooked the unique impact of regulations of the election process on speech. As the dissent noted below, substantive limits on the types of laws that can be passed are different in kind from restrictions on electoral laws. This is because elections themselves are "so suffused with speech that any attempt to control the outcome of an election affects the speech rights of those competing in the election." Pet. App. at 60. An initiative campaign, in fact, "*requires* speech" and laws that "bias electoral results also may unconstitutionally chill election-related speech." *Id.* (emphasis in original). Thus, the Utah Amendment's purpose and legislative history highlight the disconnect between this Court's cases involving the petition process and the Tenth Circuit's ruling that the Utah Amendment does not impact free speech at all. Not only did the Utah Amendment make it more difficult to *pass* an initiative on wildlife takings, but it also guaranteed that such an initiative would *never be brought in the first place*. In short, the Tenth Circuit's ruling elevated form over substance by endorsing the application of "exacting" scrutiny to content-neutral regulations on petition gathering, while allowing a law that is specifically directed at silencing political speech to go unchecked.

C. The Tenth Circuit Lost A Crucial Opportunity To Apply Justice Kennedy's Approach In *Vieth v. Jubelirer*.

It is noteworthy that a Member of the Court recently foresaw the need to analyze manipulations of electoral laws under free speech principles rather than equal protection doctrine, given that "[t]he First Amendment may be the more relevant constitutional provision." *Vieth v. Jubelirer*, 541 U.S. 267, 311 (2004) (Kennedy, J., concurring). In his concurrence in *Vieth*, Justice Kennedy opined that such exploitation "involve[s] the First Amendment interest of not burdening or penalizing citizens because of their participation in the electoral process . . . or their expression of political views." *Id.* at 314. *See also* Pet. App. at 58-59. Ironically, the argument for First Amendment scrutiny is even stronger in the present case than it is in *Vieth*, which concerned partisan political gerrymandering. At least "[s]uch [partisan] gerrymandering is allowed an open season every ten years." *Id.* at 57. In contrast, the Utah Amendment enshrines one viewpoint in perpetuity, eliminating the possibility that a future majority could change wildlife laws through the initiative process. *Id.* at 59. Worse yet, the legislatively sponsored Utah Amendment directly undermines an electoral procedure designed as a check on the legislative branch. Thus, any attempt to undo the constitutional amendment will now have to begin with the Utah legislature, the very body whose powers are checked by the initiative process. This, of course, is the political equivalent of the fox guarding the henhouse.

In concluding that the Utah Amendment does not implicate the First Amendment at all, the Tenth Circuit missed a crucial opportunity to follow Justice Kennedy's invitation to apply the First Amendment to laws designed to rig political outcomes.

CONCLUSION

The Utah Amendment's ostensibly "neutral" application to all persons interested in wildlife should not be confused with the amendment's true purpose: to "*discourage*" anyone from "putting anti-hunting and anti-fishing regulations on the ballot." Pet. at 3. The Utah Amendment does not simply make it more difficult for speech to *succeed*, it makes it more likely never to occur – thus silencing core political speech. Notwithstanding the impressive political gains of consumptive interests, a current majority should not be allowed to "enshrine[s] its gains in law against sways in popular opinion . . . through election laws designed to channel results and to squelch dissent." Pet. App. at 57. For the foregoing reasons, the Amici respectfully request that the Court grant the petition for writ of certiorari.

Respectfully submitted,

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August 25, 1995

Mr. Robert Valentine
Director
Utah Division of Wildlife Resources
1596 West North Temple
Salt Lake City, Utah 84116

Dear Bob:

I penned this note to you in my journal on the evening of August 24, 1995 and want to share it with you now.

> I'm sitting in the Northern RWAC meeting discussing waterfowl, cougar and furbearer. Of course, the effort is simple – discuss already decided upon proclamations and vote. I've raised this issue with you in great detail over the last two years. I've raised it with Ted Stewart in great detail over the last two years and it was a significant portion of the discussion within the Governor's Wildlife Committee which I sat on. It has always been greeted with a smug *'your ideas are good and valuable, but . . .'*
>
> Our interests can't be met under these biased conditions. We have no interest in simply responding to bag limits, season dates, opening hours, providing more hunting/trapping opportunities (not to mention the constant squealing for more, more, more . . . from the hunting/trapping community). Anything we have to offer under these conditions is not meaningful and can't be implemented because it is 1) outside the proclamation, or 2) doesn't provide more hunting opportunities.

> Bob, what is the point? Under this context there is no value in our participation. Thus I resign, without equivocation, from the Northern Region Wildlife Advisory Committee.

In the present tense let me restate my resignation, effective immediately, from the NRWAC. The last two years have been interesting in that the process has revealed as to how poorly we debate and establish wildlife policies. To that extent it has been productive!

With the way this process is constructed (1 – environmentalists/nonconsumptive users held at an intended extreme minority, 2 – voting and 3 – voting on proclamations), it is a hopeless endeavor on either the short or long term to generate a substantive discussion on policy issues. For example, why should cougar be hunted? Should they be hunted the same way, in the same season across the state? What are the biological/social impacts of not hunting cougar in some places or in hunting them without dogs in some places? What should we be doing to assure cougar habitat is not further fragmented. How about an analysis of actual impacts to ungulates from specific cougar populations rather than the hysterical generalizations floating though these meetings?

These broader questions would funnel public concerns into a process whereby a proclamation would emerge, meeting a broad array of public concerns, including the nonhunting publics who put a high intrinsic/ecological value on native/natural wildlife populations, not a recreational opportunity value. As it stands now the proclamation is provided to the RWACs and the fray starts. Discussion about relevant information is stymied because it is not part of the proclamation process (*'trust us, the information went into the proclamation'*). UDWR representatives get very

defensive when we start questioning the intent, accuracy, predictability and assumptions behind the modelling or information (lack of information) provided. They also get very frustrated and flustered as we raise concerns over seeming inconsistencies in the data representation. And the fact that information is not provided or nonexistant does not help this discussion.

An interesting and meaningful discussion was initiated when we questioned the data used in the cougar demographic modelling and how population densities were obtained. That is a valuable science/policy discussion and, of course, it was quickly terminated so that we could get on with the proclamation. Of course, we questioned the base assumption of reducing cougar populations to meet lower deer populations (and other reasons). It became obvious that was not a debatable or discussable issue.

The only rationale provided for a pine marten trapping season (1-2 marten trapped every couple of years), let alone expanding the season to four counties, was "we want to provide greater opportunities for our trappers." Furthermore, data was not adequately portrayed.

Bob, it is as though we don't even exist as either an opportunity or value. The concern is for hunter opportunity to the exclusion of any other values or public issues. When you add this level of UDWR bias, which also created the RWAC membership imbalance and "proclamation-voting-process," it should be obvious to even you that we can't inflict any impact on the system. This isn't an oversight.

Interestingly, a number of UDWR personnel begged and pleaded us to "stay involved, don't throw in the towel." Conceding much of what we had to say was important and

correct (clearly they harbored some disagreements with our perspective), they also recognized an inherent and profoundly negative bias of this RWAC procedure.

This process fails to move us beyond "command-and-control"[1] *politics-as-usual*. Voting is the norm rather than consensus building. It intentionally creates losers and winners. It replicates the extant arena of decision making. It does not foster discussion by requiring consensus decision making. Rather, it stymies discussion by requiring voting on motions with a panel that is intentionally and extremely skewed in representation. No time exists for reflection, discussion and solution building. Interestingly, representatives on "both" sides of the aisle complained about the level of dialogue being completely predictable. It is time to overhaul the whole damned process using many of the suggestions we have provided to you and Ted Stewart over the last couple of years. When this becomes something more than "proclamation-voting"/hunting-trapping opportunity production, we look forward to vigorous participation.

I'm compelled to resign this position prior to the August 30-September 1 training session because the agenda and goals for this session make it clear that we are

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[1] Denis Collins and John Barkdull, "Capitalism, Environmentalism, and Mediating Structures, From Adam Smith to Stakeholder Panels" *Environmental Ethics* 17 (1995) 227-244. This article notes that for stakeholder panels to operate the process must move away from government "command-and-control" by allowing stakeholders to actually construct the policies. If acceptable time frames can't be met then "command-and control" must be implemented as a last resort rather than a first step. The RWAC process uses "command and-control" as the first and only step

again being told our roles, the status quo, with an effort to improve meeting efficiency (and humaneness, I hope!)

I feel betrayed and profoundly disappointed that our views have been relegated to a corner in a dark basement. As a result of UDWR recommendations that simply discount our values, an RWAC process set up to frustrate any ability at implementing our concerns, and now a Wildlife Board excluding any broad based representation, it is clear we've been not-so-politely shoved aside.

A rather sad state of affairs, wouldn't you agree, Bob?

Sincerely,

/s/ Dick Carter
Dick Carter
Coordinator

cc: Ted Stewart